

rule banning all use of foreign customer information would seem unnecessary and overly ambitious. The U.S. has no interest in banning the use of all such information and there is no way that the Commission can hope to enforce such a complete ban.

The Commission also asks whether supplemental safeguards should be lifted for any dominant foreign-affiliated carrier whose foreign affiliate offers settlement rates at or below the low end of the benchmark range proposed in its *Benchmarks* proceeding. Sprint disagrees with this proposal inasmuch as cost based settlement rates, while necessary for fair competition, are not sufficient to accomplish this goal. Even assuming that the Commission is able to verify that the low end of its benchmarks is an accurate proxy for a foreign carrier's incremental costs of termination, the Commission must still ensure that the foreign carrier does not discriminate against U.S. carriers in other ways. True cost based settlement rates would remove only one of the reasons for dominant carrier regulation.

Sprint generally supports the Commission's proposal for structural separation between a foreign carrier and its U.S. affiliate, again with the proviso that the standard for

affiliation³¹ is correctly set.³² Such structural separation makes it less likely that a dominant foreign carrier will be able to discriminate against its other U.S. competitors in favor of its affiliate.

Historically, the primary objection to such structural separation has been the expense and inefficiency it entails.³³ The existence of international borders, however, provides a natural and straightforward basis for structurally separating the U.S. operations of a dominant foreign carrier from its other operations.

Nor does Sprint believe that the domestic U.S. model for separation as exemplified in Section 272 of the Communications Act is the proper model in the international environment. The U.S. separation model is built on Congress's intent that there be competition in all aspects of telecommunications, including local service. The

³¹ A "one size fits all" standard of affiliation will impose all of the inefficiencies of structural separation and garner none of the competitive benefits of such separation if it is applied where there is little or no incentive on the part of the dominant foreign carrier to discriminate in favor of the U.S. affiliate.

³² Sprint understands the Commission's structural separation proposal as contemplating, at a minimum, that the U.S. affiliate must remain a separate entity from the dominant foreign carrier and must keep separate books and accounts, that the dominant foreign carrier will deal on an arms length basis with its U.S. affiliate, and that the foreign carrier will not disclose to its U.S. affiliate information obtained from other U.S. carriers which compete with the affiliate. See, e.g., Comments of Sprint in the BT/MCI Merger, January 24, 1997 at 8.

³³ See, e.g., Computer III, 104 FCC 2d 958 (1986) (subsequent history omitted.)

provisions that Congress wrote reflect this goal.³⁴ But a foreign country may not subscribe to this goal, making the U.S. model inappropriate for that country. Moreover, the Commission does not have the same interest in promoting telecommunications competition in foreign countries as it does in the United States: the former is of interest to the Commission only because of its salutary effect on U.S. competition. The latter, however, has been deemed U.S. public policy by the Congress.

With respect to the Commission's prohibition in Section 63.14 of its rules against "special concessions," Sprint notes that the operation of this rule is not directly implicated by the WTO Agreement. Thus, there appears to be no need to modify the rule because of that agreement. If the Commission insists on going forward, Sprint supports applying the prohibition only to concessions granted by foreign carriers with market power in the relevant market. "Special concessions" by an entity lacking market power reflect the normal workings of a competitive market rather than abuse of a dominant position. Such a clarification is helpful in attempting to clarify a rule which is so broad that it is difficult to enforce and whose application may be highly subjective.³⁵

³⁴ See, e.g., Section 271(e)(1)'s limitations on joint marketing of local and long distance services by Bell Operating Companies and larger interexchange carriers.

The difficulty, however, is in learning whether a foreign carrier has market power, for the Commission will have to walk a fine line. A market power analysis will, very likely, lead the Commission to a full-blown competitive analysis of the foreign market, and this, in term, may lead to an evaluation of the effectiveness of regulation in a foreign country. The Commission has correctly determined this is a course which it should avoid.

Sprint also opposes the Commission's proposal in para. 119 of the NPRM to condition the authorizations of U.S. carriers to serve affiliated markets on compliance with any accounting rate benchmarks it may establish in the Benchmarks proceeding. Such a condition is likely to raise issues of MFN Treatment if the applications of carriers from some WTO Member Countries are treated differently from those of other WTO Member Countries. As Sprint has indicated before, instead of using its proposed benchmarks as an entry barrier, the Commission can simply use its prescriptive powers under the Act to require all U.S. carriers to abide by any accounting rates that the Commission prescribes.³⁶

³⁵ Although the Commission proposes in para. 117 to give greater specificity to its "no special concessions" requirement, the proposed clarifications are only marginally less sweeping than the Commission's existing rule.

³⁶ As Sprint urged in the Benchmarks proceeding, however, U.S. carriers should have a reasonable opportunity to negotiate with their foreign correspondents to achieve accounting and settlement rates that comply with any benchmarks the Commission prescribes before the Commission requires U.S. carriers to abide by those benchmarks.

Finally, the Commission asks at paras. 122 and 123 of the NPRM whether there are any other measures it should take in the event it declines to adopt the competitive safeguards it has proposed. It suggests that it might condition or deny the Section 214 applications of certain foreign carriers or their U.S. affiliates if a foreign country does not take specified pro-competitive actions within a year after the foreign carrier begins providing service in the U.S. Sprint believes that such measures would be inconsistent with the U.S. Government's commitments under the WTO Agreement. If a WTO Member Country fails to live up to its commitments, the answer lies in WTO consultation and dispute resolution rather than regulation.

Similarly troublesome is the Commission's proposal in para. 136 of the NPRM to "exercise its discretion to afford streamlined processing" where the applicant from a WTO Member Country certifies that that country has eliminated legal barriers to international facilities-based entry and licensed multiple additional international facilities based carriers to compete with the incumbent carrier. An applicant from a WTO Member Country is entitled to have its application granted by the Commission irrespective of the state of competition in its home country. It is similarly entitled to have its application processed by the Commission

on a timely and nondiscriminatory basis without having to jump through additional hoops.

VI. *Accounting Rate Flexibility*

The NPRM notes that in the Commission's recent order permitting accounting rate flexibility,³⁷ U.S. carriers are permitted to negotiate alternative accounting rate arrangements with their foreign correspondents in countries that satisfy the ECO test. The NPRM proposes to eliminate the ECO test as the trigger for accounting rate flexibility and to replace it instead with a rebuttable presumption that such flexibility will be permitted for carriers from WTO Member Countries.

Sprint agrees that it would be "administratively inefficient for the Commission and burdensome to carriers to continue to conduct an ECO analysis for purposes of determining whether to permit flexibility..." NPRM at para. 141. For reasons already explained, Sprint believes that the ECO test should be eliminated - for all purposes - in this proceeding. However, it is equally clear that the Commission should not grant accounting rate flexibility simply on the basis that the applicant and its correspondent are from WTO Member Countries.

As Sprint understands it, the WTO Agreement demands only that foreign carriers from WTO Member Countries be

allowed entry into the U.S. market and that the treatment of such carriers be consistent with the principles of National Treatment and MFN. Sprint does not understand the WTO Agreement as requiring the Commission to permit U.S. carriers, together with foreign carriers from WTO Member Countries, to implement settlement agreements that are inconsistent with the Commission's International Settlements Policy (ISP).

Whatever the advantages of a more flexible policy, flexibility which allows the departure from otherwise uniform rules obviously carries with it the possibility of serious discrimination by foreign carriers with market power. There must continue to be threshold requirements for flexibility which guard against such abuse. The ECO test was clearly intended to be such a threshold. Although Sprint concurs that the ECO test must be replaced, it is equally clear that it cannot be replaced solely by a requirement of WTO membership, even if accompanied by a rebuttable presumption in favor of such flexibility.

As the Commission itself recognizes, WTO membership itself says nothing about the state of competition in a given member country or the quality of the offer it submitted. The Commission therefore proposes to actually have the test for flexibility hang not on WTO membership,

³⁷ Regulation of International Accounting Rates, CC Docket No. 90-337,

but on the competitive state of the foreign market for which an exemption from the ISP is sought. In other words, there is a presumption in favor of flexibility for arrangements between U.S. carriers and foreign carriers from WTO Member Countries, but such presumption may be rebutted by a showing that "market conditions in the country in question are not are not sufficient to prevent a carrier with market power from discriminating against U.S. carriers." NPRM at para.

152. The Commission also explains that

This showing could be made by presenting evidence that the country has not opened its market to competition or that it does not, or will not in the near future, have in place fair rules of competition.

Id. (fn. omitted)

Unfortunately, this test does not appear to be much of an advance over ECO. First, it is entirely too vague to provide much guidance. For example, it says nothing about how much competition is sufficient to prevent discrimination if flexibility is permitted. Second, it would again involve the Commission in determinations as to regulatory developments in and competitive judgments about foreign countries that (as the Commission itself recognizes) are best avoided.

Sprint would suggest that the Commission pick an objective standard as a surrogate for competitive development which can be ascertained, hopefully with some

precision, but at least approximately. Market share may well provide such a standard and would bear sufficient relation to the extent of competition to serve as a reasonable proxy for competition.

Thus, Sprint proposes that flexibility be allowed where the former monopoly carrier in a foreign country has no more than approximately 65% of the traffic between that country and the U.S. Although there is no magic in this percentage, it would at least seem a good place to start.³⁸ A U.S. carrier seeking flexibility with a dominant carrier from a WTO Member Country should have the burden of demonstrating that the foreign carrier meets the 65% or less market share threshold. Since the latter carrier formerly had all of the traffic in the country, it should be able to calculate its approximate market share with minimal difficulty even if formal government statistics are unavailable. It would provide the certainty that carriers need, and keep the Commission away from the kind of detailed analyses that it was forced to struggle with under ECO.

VII. *France and Germany*

Sprint notes that, as a result of the Commission's decision in *Sprint Corporation*, 11 FCC Rcd 1850 (1995) ("*Sprint Order*"), it remains subject to onerous conditions

³⁸ This test would not necessarily make sense in the United States, where the Commission has ample jurisdiction to require U.S. carriers to produce whatever information the Commission deems necessary to conduct a detailed analysis of competition in the U.S. international market.

as a result of the Commission's expressed desire³⁹ to encourage France and Germany to organize their telecommunications markets in a manner that the Commission sees fit. For example, Sprint remains subject to a restriction on its circuits between France and the U.S., and Sprint must obtain prior Commission approval before France Telecom (FT) and Deutsche Telekom, A.G. (DT) may increase their existing minority and noncontrolling equity interests in Sprint.

After the WTO Agreement becomes effective, it appears that FT and DT are legally entitled to increase their ownership in Sprint to any noncontrolling level without prior Commission approval. The Commission should therefore make clear that such additional investment is permissible after January 1, 1998 notwithstanding the condition in the *Sprint Order*.

The circuit freeze on Sprint is also inconsistent with MFN and National Treatment commitments by the U.S. Government: when BT acquired a substantial investment interest in MCI Telecommunications Corporation, the Commission did not place circuit restrictions on MCI.⁴⁰ The DT/FT investment in Sprint, however, caused Sprint to be

³⁹ See, e.g., *Sprint Order* at para. 113 ("This condition also will serve as an important incentive for the effective implementation of liberalization steps sooner than might otherwise be the case.")

⁴⁰ *MCI Communications, Inc.*, 9 FCC Rcd 3960 (1994).

subjected to circuit restrictions as well as other conditions. The Commission justified the need for these additional conditions on the basis of competitive differences in the U.K., on the one hand, and in France and Germany on the other.⁴¹ It is Sprint's understanding that such distinctions are not permitted under MFN.⁴²

And as Sprint pointed out earlier, U.S. carriers with substantial market power have been permitted to enter the international market on a nondominant basis so that they are not subject to circuit restrictions of any sort.⁴³ FT and DT were only permitted to make minority, noncontrolling investments in Sprint, and even that investment was subject to conditions such as the circuit restriction.⁴⁴ The principle of National Treatment would seem to require

⁴¹ See Sprint Order at paras. 57-58.

⁴² Sprint notes that in para. 96 of the NPRM, the Commission stated that "We do not believe that the value of prior approval [of new circuits on routes where a carrier is regulated as dominant] as a tool to detect and remedy potential anticompetitive conduct justifies the burden it imposes on carriers regulated as dominant in their provision of service to countries that have eliminated legal barriers to international facilities-based competition and licensed multiple international facilities-based competitors to compete with the incumbent carrier." If prior approval of additional circuits would be unjustifiable if DT and FT were to enter the U.S. market and were regulated as dominant, it is difficult to see how the much more intrusive circuit freeze on Sprint can continue to be justified.

⁴³ See GTE Hawaiian Telephone, *supra* at n. 8.

⁴⁴ Ironically, inasmuch as France and Germany are WTO members who have made substantial commitments to open their markets, it appears that FT and DT would each be presumptively entitled to a grant of their applications to enter the U.S. telecommunications market in their own right.

similar regulation of carriers with market power without reference to the national origin of the carrier.

In short, absent a showing of the need for special regulatory safeguards, Sprint, FT and DT should each be subject to the same rules governing the potential dangers to U.S. competition by foreign carrier entry or investment as are all other carriers. Any other course would not only be inconsistent with the WTO Agreement but also with the court's holding in Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

CONCLUSION

Abolishing the ECO test will generally allow the Commission to better focus its efforts on U.S. international competition. With the WTO Agreement taking effect on January 1, 1998, the NPRM will, if properly implemented, reinforce and increase telecommunications competition around the world. Sprint urges the Commission to fine tune its proposals so that the promise of the WTO Agreement becomes a reality.

Respectfully submitted,

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